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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 177 MISC.

CLEVELAND THOMPSON, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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To the Honorable, the Chief Justice of the United States, And the Associate Justices of the Supreme Court of The United States:

And now comes the Commonwealth of Pennsylvania, by Edward C. Boyle, District Attorney of Allegheny County, and Samuel Strauss and William Claney Smith, Assistant District Attorneys, and respectfully answers the Petition of Cleveland Thompson for a Writ of Certiorari to the Supreme Court of Pennsylvania, as follows:

JURISDICTION

The Supreme Court of the United States will not consider on Certiorari questions not raised or disclosed by the record and which were not considered by the Courts below. To give the Court jurisdiction it must

appear by the record that a federal question was raised and decided adversely. *Inglee v. Collidge*, 15 U.S. 363. The essential federal question must have been set up in the Court at the proper time and in a proper manner. *Herndon v. Georgia*, 295 U.S. 441.

In this case there was no objection on the basis of "due process" during the trial to the introduction of the evidence of which the petitioner now complains. The objections made were that the evidence did not satisfy the requirements of the statute under which it was admitted. Neither was the "due process" issue advanced in the "Motion For New Trial." A further examination of the record discloses that the "due process" issue was not raised even in the petitioner's brief before the Supreme Court of Pennsylvania. It is submitted that since the issue was not properly raised before the Trial Court or the Supreme Court of Pennsylvania, that the matter may not now be considered by the Supreme Court of the United States.

QUESTION PRESENTED FOR REVIEW

Does the introduction of evidence of a prior conviction of assault with intent to murder and assault with intent to commit bodily harm violate the "due process" provisions of the XIV Amendment to the Constitution of the United States, where a state statute imposes on the jury the duty of determining the punishment in a first degree murder case?

ARGUMENT

I.

Does the Introduction of Evidence of a Prior Conviction of Assault With Intent to Murder and Assault With Intent to Commit Bodily Harm Violate the "Due Process" Provisions of the XIV Amendment to the Constitution of the United States, Where a State Statute Imposes on the jury the duty of determining the Punishment in a First Degree Murder Case?

Under the Act of May 14, 1925, P.L. 759, 18 Purdon's Pa. Stat. Ann. 2222, now part of the Criminal Code of Pennsylvania, 18 Purdon's Pa. Stat. Ann. § 4701, the jury in Pennsylvania has the duty of determining the punishment in first degree murder cases. The Act of May 14, 1925, has been interpreted by the Supreme Court of Pennsylvania to permit evidence of prior convictions so that ". . . the jury may have before it the past deeds of the accused that it may be fully advised of his nature and deserts when it fixes the penalty." *Commonwealth v. Kuruts*, 312 Pa. 343, 168 A. 28, *Commonwealth v. Dague*, 302 Pa. 13, 152 A. 839. The reason for the admission of such evidence was expressed in *Commonwealth v. Dague*, 302 Pa. 13, ". . . to enable the jury to know what manner of man the defendant was, if they should find him guilty of murder in the first degree." The Supreme Court of the United States has held that where the Court has the discretion of imposing either a death sentence or a sentence of life imprisonment it is proper "to consider the convicted person's past life, health, habits, conduct, and mental and moral propensities." *Williams v. New York*, 337 U. S. 241, 245. Where the same duty

is imposed upon a jury it would appear equally proper that they be availed of the same information so that they may intelligently exercise their discretion.

Since it appears that the matter considered by the jury in this case, e.g. prior conviction of crimes of violence, was legally and logically proper, the next question is whether the procedure established in the Courts of the Commonwealth of Pennsylvania is incompatible with "Due Process" as required under the XIV Amendment.

It has been well established by this Court that:

> "The State is free to regulate the procedure of its Courts in accordance with its own conception of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Brown v. Mississippi,* 297 U.S. 278, 285, *Snyder v. Massachusetts,* 291 U.S. 97, *Rogers v. Peck,* 199 U.S. 425.

Does the procedure adopted by the Commonwealth of Pennsylvania "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?" It is submitted that it does not. At the time of the adoption of the Fourteenth Amendment to the United States Constitution the jury did not have the duty of determining the punishment in first degree murder cases. Further, in Pennsylvania, at least, there existed no provision for the rendering of piecemeal, or separate verdicts; the law of the Commonwealth of Pennsylvania requires that all the conclusions of a jury must be comprehended in a single verdict. *Commonwealth v. Parker,* 294 Pa. 144, 153, 154; *Parek v. Scranton Ry. Co.,* 258 Pa. 589, 594.

In the trial of a first degree murder case in Pennsylvania there are two issues to be logically determined by a jury, first, the guilt or innocence of the accused, and secondly the punishment to be assessed, if guilty. It is true that the general rule of evidence is that proof of other unrelated or unconnected crimes may not be admitted as evidence of the crime of which the defendant stands charged. However, there are even exceptions to this rule, where proof of other crimes may be introduced to show *modus operandi,* motive, intent, design, absence of mistake, or predisposition to commit the crime, 22 C.J.S. §683 et seq.

In the trial of this case the evidence of prior convictions was offered only for the purpose of aiding the jury in determining the punishment. The Court was cautious in protecting the rights of the accused and instructed the jury as follows:

> "Now, in passing upon the question of penalty, if you find the defendant guilty of murder in the first degree, you should consider all of the evidence in the case. Important items for your consideration with relation to that question are; first, the facts of the crime; second, the defendant's background; third, the extent to which responsibility may be diminished under the evidence, if you find it to be diminished.
>
> Now, in this connection the Commonwealth has offered evidence of previous records against the defendant; one here, and one when in the military service which involved three charges. Counsel for the defendant has offered in evidence the matter of

intoxication and the use of marijuana, if that is part of the evidence in the case.

Now, those are items for your consideration, and you alone. You are informed that these records cannot be considered by you in passing upon the question of the guilt or innocence of the defendant; and you must clearly understand that. The question of guilt or innocence must be determined under the evidence in this case, without consideration of those records. If you come to the conclusion of returning a verdict of murder in the first degree, then you come to the question of considering the other offenses.

Now, the matter of penalty, Members of the Jury, in the event you find a verdict of guilty of murder in the first degree, is a matter exclusively within the jurisdiction of the jury." R. 1365, 1366.

This was not an instance where the jury is permitted to consider an unrelated crime for determining the innocence or guilt of the accused. The sole purpose of such testimony was to aid the jury in the determination of the punishment of the accused in the event that they found him guilty. The jury was adequately and properly instructed on this point.

It is not unique that a jury may have before them proof of the commission of other crimes by the accused which are supposed to be divorced in their minds from other evidence offered in proof of the crime. A defendant in a criminal case who takes the stand in his own behalf is subject to introduction of proof of the commission of other crimes as affecting his credibility. *Commonwealth*

v. Gibbs, 167 Pa. Super. 79; *Commonwealth v. Barclay*, 178 Pa. Super. 568, Wigmore On Evidence (1940 Ed.) §§891, 926.

In substance, the petitioner argues that it is not fair to permit the jury to consider evidence relative to the issue of punishment at the same time that it considers evidence relative to the issue of guilt or innocence. The only alternative to the procedure followed is that the jury render separate verdicts, a procedure not provided for either by the Constitution or Legislature of Pennsylvania or by the established procedure of the Pennsylvania Courts. The Supreme Court of the United States in *Snyder v. Massachusetts*, 291 U.S. 97, held as follows:

> "The Constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness." 291 U. S. 122.

The practice of submitting evidence of prior convictions relative to the determination of punishment in first degree murder cases has existed in Pennsylvania for over thirty years. The Supreme Court of the United States has been asked to review it on previous occasions but has refused. In *Commonwealth ex rel. David Darcy v. Earl D. Handy, Warden*, 338 U.S. 862, a Petition for Certiorari to the Supreme Court of the United States was denied wherein was raised the precise question raised in this petition, 338 U.S. 862, Petition of David Darcy for Certiorari, P. 11. Other cases in which the

same type of evidence was introduced and certiorari denied are:

Commonwealth v. Lowry, 374 Pa. 594; Cert. denied. 74 S. Ct. 479; 347 U. S. 914; 98 L. Ed. 1070.

Commonwealth v. Johnson, 372 Pa. 266; Cert. denied. 73 S. Ct. 944; 345 U. S. 959.

Commonwealth v. Thompson, 367 Pa. 102; Cert. denied. 72 S. Ct. 58; 342 U. S. 835.

Commonwealth v. Simmons, 361 Pa. 391; Cert. denied. 70 S. Ct. 96; 338 U. S. 862; Rehearing denied. 70 S. Ct. 181; 338 U. S. 888.

Commonwealth v. DiPofi, 362 Pa. 229; Cert. denied. 70 S. Ct. 82; 338 U. S. 852.

WHEREFORE, respondent respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari in the above captioned case.

Respectfully submitted,

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